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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1891

KELLWOOD COMPANY, OTTENHEIMER DIVISION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,
Respondents.

RESPONSE TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1251.

KELLWOOD COMPANY, OTTENHEIMER DIVISION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,
Respondents.

RESPONSE TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Board's brief in opposition (p. 15) correctly observes that the "basic issue raised by the petition is whether an overall refusal to bargain in good faith may be found despite the employer's desire to reach an agreement, primarily because he has manifested an anti-union attitude and has taken a bargaining stance which may 'embarrass' or 'denigrate' the union." Both the Board and Union briefs in opposition argue, however, that this case is not an appropriate vehicle to present this question. They demonstrate precisely the opposite. The present case, as the briefs themselves make apparent, raises in clear focus the critical issue of whether the Board may utilize negotiating attitudes and stances *as the sole basis* for finding a refusal to bargain in good faith.

1. The Board argues that, apart from Kellwood's "attitude and the quality of its bargaining proposals", there were "other acts" which manifested its intent not to reach a final agreement. Bd. Br., pp. 15-16. This contention misconstrues the basis for the decision below. The Court of Appeals did not consider such "other acts" in the context of a desire, or lack of desire, to reach agreement. The presence or absence of such intent was immaterial to the court. Instead, the court's singular concern with such "other acts" was as "evidence" of a design "to embarrass and undermine the union" and "denigrate the union in the eyes of its members". Appendix B-1, pp. A7-A9.

Kellwood's negotiating attitudes and stances formed the very core of the court's decision. They are also the crux of the briefs in opposition. For example, both briefs (Bd. Br., pp. 4-5, 16; U. Br., pp. 4-5) condemn the timing of the announcement of a wage increase at the Company's unrepresented plants on the ground that it was "designed to maximize its adverse effect upon the Union's bargaining power and bargaining position in the Little Rock negotiations." However, even assuming such a motive, does good faith bargaining preclude employer action designed to minimize union bargaining power? Does good faith bargaining require that employer conduct at unrepresented plants enhance, rather than detract from, a union's bargaining position? Similarly, may not an employer engage in non-coercive communications to its employees during negotiations even though the effect may be to "undermine the Union's position at the bargaining table" (Bd. Br., pp. 11-12, 16; U. Br., p. 5)? Is it a "deceit", and bargaining in bad faith, for a company negotiator to fail to "immediately" present a new offer and determine on his own the appropriate timing for a response to a union proposal (Bd. Br., pp. 9-10, 16)?

These are some of the questions central to the decision below. They are questions which, for the reasons set forth in the petition, should be answered by this Court.

2. The briefs in opposition seek to compress this case within the traditional mold of bad faith bargaining, a mold premised entirely upon the absence of any intent to reach final agreement. It surely requires no "stretch of the imagination" (U. Br., pp. 6-8) to ascertain that the decision below is cast in an altogether different mold. The court below expressly *assumed* Kellwood desired to reach final agreement. It *assumed* a "good faith" acceptance of the Union's proposal. Appendix B-1, p. A6. The court simply did not regard the absence of an intent to reach final agreement as the *sine qua non* of a refusal to bargain in good faith.

The court's opinion is predicated entirely on a belief that employer conduct which may "embarrass" or "denigrate" a union is, *standing alone*, sufficient to support a refusal to bargain. This approach posits a novel and dangerous standard of good faith negotiation. It adopts a criterion which, as discussed in the petition (pp. 11-16), has been specifically rejected by the Fifth and District of Columbia Circuits. It establishes a new and uncharted area of governmental interference in the process of collective bargaining which warrants review by this Court.

3. Despite protestations to the contrary, both briefs in opposition repeatedly resort to negotiating attitudes and stances, rather than an absence of any desire to reach agreement, to justify the decision below. For example:

> (a) The Board notes that, "although both sides knew the economic issues were the critical ones, the Company insisted on discussing non-economic subjects first . . ." Bd. Br., pp. 3-4. This bargaining technique, a standard approach of most experienced employer

negotiators,[1] clearly does not demonstrate the absence of any intent to reach final agreement.

(b) The Board criticizes Kellwood's initial wage proposal because, "for two six-month periods during the three-year contract term, the Company's minimum would not have been above the federal minimum." Bd. Br., p. 4, n. 1.[2] The Union suggests a different defect in the Company's wage offers—that while the Company had decided in May that a ten-cent increase was its *outside maximum* (Appendix C-2, p. A66), this amount was not offered to the Union until July. U. Br., pp. 4-5.[3] Again, such an analysis of the amount and timing of bargaining stances is irrelevant to determining whether there exists a desire to reach agreement.

(c) The Board and Union find fault with Kellwood's failure to ask the Union "to spell out the details" of its disputed September 22 wage proposal. The absence of a request for an explanation, and the re-

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1. See "How to Win at the Bargaining Table", Research Institute of America (March 4, 1966), at p. 6, recommending to employer negotiators that they "[p]ostpone wages and other money benefits until other desired changes have been worked out; once it has an agreement on money the union has no motivation to consider a change in the grievance procedure."

2. At one point the Board even suggests that the Company considered the Union to be "proposing a minimum wage that would be *less than* the prevailing federal minimum . . ." Bd. Br., p. 9 (emphasis added). This is clearly preposterous; the Board found only that the Company viewed the Union's proposal as one "which would permit any employee to receive *only* the Federal minimum during two six-month periods of the contract." Appendix B-2, p. A61 (emphasis added). Indeed, the whole wage rate argument is a strawman. The proposed wage rate was only a *minimum* guarantee, rather than the employees' base rate which would have been 27½¢ an hour higher.

3. Cf. "How to Win at the Bargaining Table", *supra* n. 2, at pp. 5-6: "Don't make an offer on wages until the union comes in with a realistic figure. . . . Don't close out an agreement too early. . . . If the situation is heading toward impasse, try to save a little something for the conciliator or mediator to work with."

ultant misunderstanding of the proposal, are accordingly categorized as part of a "contrived . . . device to foul up and obstruct the bargaining process." Bd. Br., pp. 7, 9, n. 3; Union Br., p. 5. This contention is also founded upon a subjective evaluation of negotiating attitudes and stances. It is one which raises a host of controversial problems with which the Board should not be concerned. Thus, should the burden of explanation be one placed on the party receiving, rather than proffering, an offer? And if the Union's failure to make its position clear was found to be a practice "not to be condoned" (Appendix C-2, p. A60), how can the absence of a Company request for clarification then be deemed part of a contrived plot?

(d) Much ado in both briefs (Bd. Br., pp. 11-12; U. Br., pp. 5-6) is made about the Company's assumption that an impasse existed on October 24 although its October 6 retroactivity offer had originally been proposed as open for acceptance until October 28. This argument is one which, once more, presumes that the Board is the regulator of bargaining strategy and approaches. The retroactivity proposal was made to encourage the employees "to vote to accept [the Company's entire] offer and end all this confusion and uncertainty." Appendix C-2, p. A71. No such vote was forthcoming; in fact, at the October 24 bargaining meeting the Union informed the Company that its offer had been voted on twice, twice rejected and a strike vote taken. Appendix C-2, p. 75. The Company was not required to engage in a futile act and leave its proposal open until October 28 anyway because the Union might have changed its mind. The wisdom of negotiation tactics of this nature cannot be the touchstone of a refusal to bargain.

(e) The Union (U. Br., p. 6) deprecates the significant concessions made by the Company during the course of negotiations (Petition, p. 15) asserting that they represented either established Kellwood practices or changes that would also be effectuated at its unrepresented plants. There is no basis in the

record for this bald assertion.[4] Nor is there any ground for contending that such concessions do not evidence a desire to reach agreement if, in fact, such intent is still the standard for a refusal to bargain in good faith.

4. As we noted in the petition (pp. 15-16), this case is illustrative of a new Board approach to collective bargaining. Board Chairman Miller recently made a similar observation in a dissent to an analogous Board decision in *Western and Southern Life Insurance Company*, 188 NLRB No. 76, 76 LRRM 1342 (Feb. 11, 1971). The Chairman, relying as we do on the position of the District of Columbia Circuit in *United Steelworkers of America* v. *N. L. R. B. (Florida Machine & Foundry Co.)*, ... F. 2d ....., 75 LRRM 2790 (Dec. 4, 1970) (See Petition, pp. 11-16), commented in language equally apropos here:

> "The balance of the case presents another one of those instances in which hard bargaining has not produced an agreement, and where the union either does not have, or does not choose to utilize, its economic strength as a means of attempting to secure a contract suitable to it. Instead it filed a charge with this Agency, seeking whatever advantage one of our bargaining orders may give it in its efforts to move the employer to a less obstinate position.
>
> "Passing the question as to whether it is wise for us to serve as a lever in bargaining situations, my view of the record here does not lead me to the conclusion that there was a lack of good faith by respondent, but rather to the conclusion that it was a hard bargainer.

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4. The Board similarly distorts the record in its reference to the Gethuns service award speech on December 22, 1967. Bd. Br., p. 13. This speech was not related in any way to Company's statements during the union organizational campaign more than two years prior. As the speech itself makes clear, the fulfilled "promises" referred to were promises made to employees in 1966 that, despite the strike, Kellwood intended within a short period to rebuild its Little Rock operation "back to where it was before the strike". Appendix C-2, p. A40.

> As the trial examiner saw it, 'respondent made no meaningful concessions.' As the statute and this Board and the courts have made clear, a failure to make concessions (much less 'meaningful' concessions) does not violate our Act. . . ."

For the foregoing reasons, as well as those set forth in the petition, this petition for writ of certiorari should be granted.

Respectfully submitted,

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